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CITY OF SHELTON : SUPERIOR COURT  
v. : JUDICIAL DISTRICT OF  
SHELTON POLICE UNION, INC. : ANSONIA-MILFORD AT MILFORD  
: NOVEMBER 5, 2020

**MEMORANDUM OF DECISION RE AMENDED APPLICATION  
TO VACATE ARBITRATION AWARD (No. 103)**

STATEMENT OF THE CASE

I

By this application, the plaintiff, City of Shelton, asks the court to vacate an arbitration award issued by the State Board of Mediation and Arbitration (board), by which the board reinstated to his prior rank and position, after a period of suspension, a police officer who disseminated racially and otherwise offensive and inflammatory material on his Facebook page. In reinstating the officer, and sustaining his grievance, the board overturned the decision of the plaintiff's chief of police and mayor, both of whom concluded that the officer's conduct warranted termination. For the reasons that follow, the plaintiff's motion to vacate is granted.

A

By way of background, the court recites certain facts as found by the board in its written arbitration award dated April 18, 2019 (award). This court takes as its starting point "the factual findings of the arbitrator, which are not subject to judicial review." (Citation omitted.) *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union*, 316 Conn. 618, 638, 114 A.3d 144 (2015). With respect to the board's findings of fact, the award reads, in part, as follows:

"The Grievant, Officer Daniel Judkins, was terminated from his employment with the Police Department for the City of Shelton ('City'), by a letter from the City dated and effective on

11/5/2020 mailed to Reporter of Judicial Decisions 231 Capital Ave, Hartford, CT

June 5, 2017 (Joint Ex. 11). The termination was based on social media postings he displayed on his 'Facebook' internet account, which the Department deemed to be offensive and in violation of Department Rules and Regulations 1-1, J-10, J-22, and a Department policy entitled 'Personal Web Pages, Blogs, or Similar Types of Media', Policy# 110705 (the 'Social Media Policy', Joint Ex. 6). The City made a determination there was just cause to discharge Judkins.

"Officer Judkins was hired by the Department on August 27, 2007. He is a member of the Shelton Police Union ('Union'), and his employment is governed by a Collective Bargaining Agreement between the Union and the City ('CBA' or 'Agreement') with an effective date July 1, 2016 through June 30, 2019 (Joint Ex. 2).<sup>[1]</sup> The Union filed a grievance challenging that the

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<sup>1</sup> In the Award, the arbitration panel recited "**PERTINENT PROVISIONS OF THE AGREEMENT**", in part, as follows:

**ARTICLE XXIV - GRIEVANCE PROCEDURE & ARBITRATION [Joint Ex. 2]**

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**Section 24.03.** The following shall be the sole means for resolving complaints and/or grievances between the parties with the exception of alternative State and Federal statutory appeals procedures which are available.

**Section 24.04.**

STEP #1: The aggrieved employee or employees must present the grievance in writing to the President of the Union and to the Chief of Police, specifying the circumstances and date of the grievance, within ten (10) calendar days of the event giving rise to the grievance. Within ten (10) calendar days after receiving such, the Police Chief or his designated representative, shall render his decision in writing to the aggrieved employee or his representative if represented.

STEP #2: If the aggrieved employee and/or his representative is not satisfied with the decision rendered by the Chief of Police or his designated representative, within fifteen (15) calendar days thereafter, the aggrieved employee and/or his representative shall present the grievance in writing to the mayor, or his designee. The decision of the Mayor, or his designee, shall be rendered in writing to the aggrieved employee or his representative within ten (10) calendar days thereafter.

STEP #3: If Steps 1 and 2 hereof have been complied with and a settlement of the grievance has not been effected, either the City or the Union may process the grievance to arbitration by submitting it to the Connecticut Board of Mediation and Arbitration, with a copy to the other party,

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*[Continuation of footnote 1]*

within thirty (30) calendar days of the answer of the Mayor or designee. The costs of arbitration shall be borne equally by the parties. By mutual agreement, the grievance may be submitted to the American Arbitration Association. The arbitration decision shall be final and binding upon the Employer and the Union. Time limits set forth in this Section may be waived by mutual agreement of the City and the Union.

**Section 24.05.** No employee shall be disciplined or discharged except for just cause. Any disciplinary action taken shall be appealable through this grievance procedure.

**Section 24.06.** The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision of the issue presented and shall confine his decision solely to the alleged violation of this Agreement and to the precise issue submitted for arbitration. The hearings shall be conducted in accordance with the arbitration agency's rules of procedure.

**Section 24.07.** Arbitration awards will not be made retroactive beyond the date of the occurrence of the event upon which the grievance is based.

## **DEPARTMENT OF POLICE SERVICES - POLICY MANUAL**

### **Personal Web Pages, Blogs, or Similar Types of Media**

**Number: 110705 DATE OF ISSUE: July 5, 2011 [Civ Ex. 2]**

**PURPOSE:** The purpose of this policy is to establish guidelines for having a personal web page, blog, or other types of communications media.

**POLICY:** Members of this Shelton Police Department may maintain personal web pages, blogs, or other types of communications media, electronic or otherwise. It is not permissible, however, to represent or imply that any of the above referenced media in any way officially represents the Shelton Police Department. Employees shall not use any information obtained in their official capacity on personal web pages, blogs, or similar media without the express written permission of the Chief of Police.

### **RESPONSIBILITIES:**

1. Members of this agency shall display exemplary behavior and use good judgment while engaged in both on and off-duty conduct. This rule of conduct applies to computer and internet related activities such as participation in chat rooms, blogs, dating services, social networking sites, and other World Wide Web related services. Employees shall not participate or contribute in any fashion in any of the above forums in any way that may have an adverse impact on the community respect for, confidence in, or reputation of the Shelton Police Department.

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*[Continuation of footnote 1]*

2. Employees who have personal web pages, blogs, or any other type of internet or electronic posting, which can be accessed by others shall not identify themselves directly or indirectly as a member of the Shelton Police Department in such a manner that would bring disrepute upon or affect the efficient operations of the agency or adversely affect community respect for, confidence in or reputation of the Shelton Police Department.
3. Employees who have personal web pages, blogs, or other types of internet postings shall not use photographs or other images of agency uniforms, patches, badges, logos, or vehicles on these sites.
4. Exceptions to these provisions may be granted at the discretion of the Chief of Police based on specific application and after consideration of the time, place, manner, forum, and type of intended electronic communication.

#### **EXCERPTS FROM SHELTON POLICE DEPARTMENT RULES and REGULATIONS (Revision September 1996) [Joint Ex. 5]**

The following Rules and Regulations are set forth for the governance of the Shelton Police Department, subject to such additions, amendments or revocations as the good of the service may require. Rules, Regulations and General Order enacted heretofore shall continue in effect until specifically revoked by direction of the Chief of Police. Violations of any of the rules and regulations, general orders, or the lawful commands of a superior officer by Police personnel, shall be subject to disciplinary action. . . .

#### **PREFACE**

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The officer's chief responsibilities are to preserve the peace, to protect persons and properties, and to search out offenders against the law. He should aim to be not only an efficient officer but also a high grade citizen apart from his duties. His standing in the community, as well as his usefulness as a citizen and an officer, are affected by his habits and associates when not on duty quite as much as when in uniform. His position is an honorable one and he should take pride in holding the same. The police officer should realize that, apart from doing what he is expected to do, he has opportunities, beyond those of the average citizen, for rendering service to the community in which he lives. The misjudgments and misdeeds of one officer may cast reflection upon the entire force; and individual ambition or selfishness is sure to impair the efficiency of the department. The best interests of this important part of the City Administration demand not only individual excellence, but also a spirit of loyalty and cooperation on the part of each member of the force.

#### **OBEDIENCE TO ORDERS**

I -1 Orders of the department shall be issued by the Chief of Police or designate. All orders shall continue in force until rescinded by a subsequent order. All members of the department shall be required to familiarize themselves with the contents of all orders. Under no circumstances shall

termination lacked just cause. The City denied the grievance at Steps 1 and 2, and the Union filed a demand for arbitration at Step 3 (Joint Ex. 3). This matter was heard before this panel over sixteen dates, from October 3, 2017 to July 16, 2018. The remedy sought is reinstatement for Judkins, to be made whole, including back pay, and a recovery of his attorney's fees.

“In January of 2017, then-Acting Chief Shawn Sequeira assigned Sergeants Michael Lawrence and Matthew Kunkel to conduct an internal investigation of Officer Judkins, and provided them with copies of twelve Facebook posts printed from Judkins' Facebook page. Lawrence and Kunkel reviewed the Facebook posts, and also reviewed Judkins' Facebook account for any other posts. After that review, they narrowed the scope of the investigation to five posts they determined warranted further review (the five posts are Joint Exs. 12A to 12E).

“Officer Judkins received a memorandum dated January 10, 2017 (Joint Ex. 6) from Kunkel and Lawrence informing him he was being investigated for a possible violation of the Department Rules and Regulations and the Social Media Policy. The Sgts. interviewed Judkins in a ‘Garrity’ interview on January 26, 2017 (Joint Ex. 7) which was attended by his attorney. At that

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*[Continuation of footnote 1]*

lack of knowledge of such orders be considered as an excuse for their nonobservance by any member of the department.

## **DEPARTMENT**

J-10 Members or employees shall not speak disparagingly of any individual in terms of race, creed, sex, color, marital status or age, Members of the department shall be truthful in all written and oral statements.

J-22 The violation of any law of the state of Connecticut or of any ordinance or regulation of the City of Shelton or of any State or Federal law, or of any rule or regulation of the department, or any disobedience of any legitimate order either on or off duty shall be cause for disciplinary action. Any unbecoming conduct detrimental to the welfare or good name of the department, after warning, shall be cause for disciplinary action.

interview, Judkins was provided with copies of his Facebook posts, which he acknowledged he had posted. The IA report (Joint Ex. 8) described the five posts as follows:

“On January 15, 2015 Officer Judkins reposted a video from Facebook user ‘Delorean’ titled ‘So is this what REAL NIGGAS are???’. The video shows an individual shooting a firearm at another individual in the chest while the individual getting shot was wearing body armor. The video is a few minutes long and the unknown individuals in the post use the word ‘Nigga’ several times in the post.

“On January 28, 2014 Officer Judkins posted a picture of a young child, possibly his son, sitting in the Shelton Police Dispatch center with the comment ‘JC Tortora at work’. Worth noting is that JC Tortora used to be a dispatcher at the Shelton Police Department and this post is presumed to be in a joking manner. There are several dispatch computer screens in the background of the picture but when enlarged nothing can be read on the screens.

“On January 16, 2014 Officer Judkins reposted a video from Facebook user name ‘Jr Ryda Jimenez’ titles [sic] ‘Niggas want to be Gangsta Until that time is given @popoff02’. The video is approximately two (2) minutes long and shows and [sic] individual being sentenced in court for a serious offense.

“On December 18, 2013 Officer Judkins reposted a picture from Facebook user ‘Bane Unrated’ which shows the villain Joker from the Batman series. The picture has text that states ‘MUSLIM MAN SAY [sic] GAYS SHOULD HANG FROM LIGHT POSTS AND NO BODY PANICS. CHRISTIAN MAN SAYS GAYS WON’T SEE KINGDOM OF GOD, AND EVERYONE LOSES THEIR MINDS!’

“On October 30, 2013 Officer Judkins posted a long script starting out with his dislike of Obamacare [the ‘Affordable Care Act’]. In the post Officer Judkins refers to President Obama as ‘Fuck this anti American muslim piece of shit president!’ Officer Judkins refers to his First Amendment right (free speech) and writes ‘And if u say anything along the lines of ‘this offends me’ FUCK U AN [sic] EVERYTHING THAT ‘OFFENDS’ U!N’. During this post under the comments section Shelton Police Officer Mary Beth White responds on the same date ‘I’m unfriending you because I don’t have time to read all of your foolishness!’

“In the IA report Sgts. Kunkel and Lawrence concluded that Officer Judkins’ Facebook posts violated the Social Media Policy, and Rules 1-1, J-10 and J-22. Judkins was provided notice

on April 4, 2017 (Joint Ex. 9) of a pre-disciplinary conference ('Loudermill') which was conducted on April 12, 2017. The Loudermill notice stated that he was in violation of Rules J-22, 1-1, J-10, and the Social Media Policy. The conference was conducted April 12, 2017 with [Judkins], his counsel, and Union Representative Napoleone. Chief Sequeira then issued his recommendation for discipline on June 2, 2017 (Joint Ex. 10) and the City's Administrative Assistant John P. Bashar issued a notice of employment termination on June 5, 2017 (Joint Ex. 11).

"During the hearing, the Union also challenged whether Officer Judkins had a history of discipline on which the City was entitled to rely in making a determination to discharge him, since the Chiefs['] recommendation and the discharge letter referenced prior misconduct. In particular, the parties presented a great deal of testimony and exhibits relating to an incident at Judkins' residence on April 11, 2015 in which he and his brother-in-law had a physical altercation which ended up with their arrest (the 'April 2015 Domestic' incident). The parties also offered evidence relating to an incident on December 16, 2016, in which Judkins assisted in stopping a school bus that was being operated by a driver possibly under the influence of drugs or alcohol (the 'School Bus' incident). The Union asserted that neither incident could constitute prior discipline on which the City could rely, whereas the City argued the opposite.<sup>[2]</sup>

"The parties filed their briefs in this matter on or about October 5, 2018, and filed their reply briefs on or about November 6, 2018, after which the panel met in executive session." Award, pp. 1-3. The board framed the issues as follows: "1. Did the City violate Section 24 of the

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<sup>2</sup> The arbitration panel refused to consider certain prior conduct of Judkins in issuing its award, including what it defined as the "April 2015 Domestic" incident and the "School Bus" incident. In the amended application to vacate, the plaintiff does not argue that the board's preclusion of these incidents constitutes a basis for vacatur under General Statutes § 52-418 (a) (3), nor is any such argument reflected in its brief. As a result, the preclusion of these matters is not considered by the court in connection with the amended application.

collective bargaining agreement between the City and the Shelton Police Union when the City terminated the employment of the Grievant (Daniel Judkins) on June 5, 2017? 2. If so, what shall the remedy be?” Id., p. 1.

In the award, the panel concluded that “[i]n reviewing the five Facebook posts, the panel finds that some of the language and ideas contained [therein are] inexcusably offensive, and not acceptable language or ideas that should be used in social media by any City police officer. . . . [T]he panel agrees with the City that [Judkins] must be held responsible, . . .” Id., p. 12. Moreover, the panel determined that “the City was justified in finding [that Judkins] violated the enumerated Department Rules.” Id. More specifically, the board found that Judkins violated Rules J-10 and J-22, and further agreed with the plaintiff that “it should be common sense that police officers should not post extremely offensive materials on their social media, even in the absence of a specific policy.” Id., p. 16. In the award, the panel stated: “The critical point is that under Department rules, [Judkins] is prohibited from posting these statements if he has reason to understand that they can be offensive.” Id. Despite the foregoing, the panel sustained the grievance and found that the plaintiff “did not establish just cause to terminate [Judkins’] employment.” Id., p. 29.<sup>3</sup>

## B

During the arbitration, the plaintiff attempted to introduce into evidence documents that were marked as City Exhibit 1. See Docket Entry No. 107.00, Ex. 1. This exhibit was marked for

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<sup>3</sup> While the court is bound by the board’s factual findings, “for purposes of [a] public policy analysis, [the court’s] determination of whether the conduct in question was so egregious that any punishment short of termination would offend public policy is not restricted to [the arbitrator’s] findings. . . . [W]e review de novo the question whether the remedy fashioned by the arbitrator is sufficient to vindicate the public policies at issue.” (Citations omitted.) *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union*, supra, 316 Conn. 638-39.

identification purposes only and was at no time admitted as a full exhibit by the board. City Exhibit 1 consists of the five Facebook posts described in the arbitration award, as well as seven additional Facebook posts, including one dated January 14, 2014, in which Judkins writes: “1. Punch that mother in the face [she’s] a useless cunt(sry ladies the word fits here) 2. Disbar and hang this judge shes a useless piece of shit 3. Release dad give him full custody a medal and make him a shining example for all of the deadbeat fathers in this world!” This post uses an extremely offensive and demeaning term. See, e.g., *State v. Baccala*, 326 Conn. 232, 251, 163 A.3d 1 (2017) (“we must acknowledge that the words used by the defendant—‘fat ugly bitch,’ ‘cunt,’ and ‘fuck you , . . .’ were extremely offensive and meant to personally demean . . . .”) Furthermore, by using the words “punch” and “hang,” Judkins’ post advocates violence against an individual as well as a judge. It also expresses disdain for judicial authority by referring to a judge as a “useless piece of shit”.

Other posts in City Exhibit 1 can be fairly interpreted to condone, advocate, or glorify violence, including (1) an item that states, “HA! HA!”, in connection with a website link that reads, in part, “cop-blocker-kory-watkins-hit-by-drunk-driver-after-protesting-police-stafety-checkpoint/” and (2) Judkins’ commentary on an article from theblaze.com entitled, “Mother of Murdered 7-Year-Old Girl Gets Some Serious Closure: She Burned. . .” as follows: “Almost Perfect! They should have tied him up in it while it burned!!”<sup>i</sup> Although referred to by the panel in its award, the foregoing posts, as well as others contained in City Exhibit 1, were precluded and not considered by the arbitration panel in deciding to reinstate Judkins.

## DISCUSSION

### I

The plaintiff’s amended application seeks to vacate the arbitration panel’s award on three grounds: (1) that the arbitrators exceeded their powers or so imperfectly executed them that a

mutual, final and definite award upon the subject matter was not made; (2) the award violated public policy; and (3) the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy. For the reasons that follow, the court agrees with the plaintiff's third argument, that the arbitrators were guilty of misconduct in refusing to hear evidence pertinent or material to the controversy and took action by which the rights of the plaintiff were prejudiced, thereby requiring the court to vacate the award pursuant to General Statutes § 52-418 (a) (3). As the court concludes that the arbitrators improperly refused to hear pertinent and material evidence, and the matter is ordered reheard, the court need not consider substantively the first two arguments advanced by the plaintiff.

This court has considered previously, and at length, the history of arbitration in our legal tradition, including Connecticut's legislative and judicial policies favoring the arbitration of disputes. See *Silverstone v. Connecticut Eye Surgery Center South, LLC*, Superior Court, judicial district of New Haven at New Haven, Docket No. CV-18-6080472 S (October 23, 2018, *Pierson, J.*). Our Supreme Court has held that "for many years [it has] wholeheartedly endorsed arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation. . . . When arbitration is created by contract, we recognize that its autonomy can only be preserved by minimal judicial intervention. . . . Because the parties themselves, by virtue of the submission, frame the issues to be resolved and define the scope of the arbitrator's powers, the parties are generally bound by the resulting award. . . . Since the parties consent to arbitration, and have full control over the issues to be arbitrated, a court will make every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings. . . . The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it, and only upon a showing that it falls within the proscriptions of

§ 52-418 of the General Statutes, or procedurally violates the parties' agreement will the determination of an arbitrator be subject to judicial inquiry.” (Citations omitted; internal quotation marks omitted.) *O & G/O'Connell Joint Venture v. Chase Family Limited Partnership No. 3*, 203 Conn. 133, 145-46, 523 A.2d 1271 (1987).

“A party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter . . . . Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration.” (Internal quotation marks omitted.) *DeRose v. Jason Robert's, Inc.*, 191 Conn. App. 781, 794, 216 A.3d 699 (2019), citing *Bridgeport v. Kasper Group, Inc.*, 278 Conn. 466, 478-79, 899 A.2d 523 (2006). “The propriety of arbitration awards often turns on the unique standard of review and legal principles applied to decisions rendered in this forum. [Thus, judicial] review of arbitral decisions is narrowly confined. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution.” (Citation omitted; internal quotation marks omitted.) *Board of Education v. New Milford Education Assn.*, 331 Conn. 524, 531, 205 A.3d 552 (2019).

“The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it. . . . [W]e have . . . recognized three grounds for vacating an [arbitrator's] award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of [General Statutes] § 52-418. . . .” (Footnote omitted; internal quotation marks omitted.) *Marulli v. Wood Frame Construction Co., LLC*, 124 Conn. App. 505, 509, 5 A.3d 957 (2010), cert. denied, 300 Conn. 912, 13 A.3d 1102 (2011), citing *Bridgeport v. Kasper Group, Inc.*, supra, 278 Conn.

473-77. “If such party fails to carry [this] burden, then the court has no discretion but to confirm the award.” (Citation omitted.) *Between Rounds Franchise Corp. v. EDGR Real Estate, LLC*, 52 Conn. Supp. 295, 298, 40 A.3d 833 (2011), *aff’d*, 134 Conn. App. 857, 40 A.3d 342, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012), citing *Middlesex Mutual Assurance Co. v. Komondy*, 120 Conn. App. 117, 128, 991 A.2d 587 (2010).

The first two grounds for vacating an award are based on the common law. “We denominate constitutionality and public policy exceptions as common-law grounds . . .” (Citation omitted; internal quotation marks omitted.) *Spearhead Construction Corp. v. Bianco*, 39 Conn. App. 122, 131, 665 A.2d 86, cert. denied, 235 Conn. 928, 667 A.2d 554 (1995). The common law grounds for vacating arbitration awards are narrowly construed. *Id.* (“We have historically construed narrowly the two common-law grounds for vacating an arbitration award.”); see also *State v. AFSCME, Council 4, Local 387, AFL-CIO*, 252 Conn. 467, 475, 747 A.2d 480 (2000) (“the public policy exception to arbitral authority should be narrowly construed”).

With respect to Connecticut’s statutory provisions for vacating an arbitration award, General Statutes § 52-418 (a) reads, in part, as follows: “Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects . . . (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.”

“The concept of arbitral ‘misconduct’ does not lend itself to a precise definition but is, instead, best illustrated by example. . . . Among the actions that have been found to constitute such misconduct on the part of an arbitrator as would warrant vacating an arbitration award are the following: participation in ex parte communications with a party or a witness, without the knowledge or consent of the other party . . . ex parte receipt of evidence as to a material fact, without notice to a party . . . holding hearings or conducting deliberations in the absence of a member of an arbitration panel, or rendering an award without consulting a panel member . . . undertaking an independent investigation into a material matter after the close of hearings and without notice to the parties . . . and accepting gifts or other hospitality from a party during the proceedings. . . . An award may likewise be set aside on the basis of procedural error by an arbitration panel if, for instance, the panel arbitrarily denies a reasonable request for postponement of a hearing . . . or commits an egregious evidentiary error, such as refusing to hear material evidence or precluding a party’s efforts to develop a full record. . . . Though not exhaustive, these examples of arbitral misconduct delineate the broad contours of conduct that is unacceptable and prohibited under § 52-418 (a) (3). . . .” (Citations omitted.) *O & G/O’Connell Joint Venture v. Chase Family Limited Partnership No. 3*, supra, 203 Conn. 146-48. In order “to vacate an arbitrator’s award on the ground of misconduct under § 52-418 (a) (3), the moving party must establish that it was substantially prejudiced by the improper ruling.” (Citation omitted.) *Bridgeport v. Kasper Group, Inc.*, supra, 278 Conn. 476.

For the following reasons, and in the specific circumstances of this case, the court finds that the arbitration panel was guilty of misconduct in refusing to hear and consider evidence material and pertinent to the controversy, and took action that substantially prejudiced the plaintiff’s rights, thereby requiring the award to be vacated pursuant to § 52-418 (a) (3).

## II

The record makes clear that the arbitration panel refused to admit City Exhibit 1 on the grounds that its decision had to be limited to the five Facebook posts contained in Joint Exhibit 12. In arguing that the board should not admit into evidence any of Judkins' posts other than the five contained in Joint Exhibit 12, the defendant's counsel argued that the plaintiff's investigation was limited to the five Facebook posts set forth in Joint Exhibit 12. As a result, the defendant's counsel took the position that admitting into evidence other posts would be unfair to Judkins and beyond the scope of the arbitral submission. Tr. of Hearing re Termination of Daniel Judkins dated January 12, 2018, Vol. 4, 48(14)-51(4) (No. 110.00). In response, counsel for the plaintiff argued that the additional posts contained in City Exhibit 1 "form[] part of the issue of termination, but when making a decision on termination ... you look at mitigating factors, aggravating factors. You don't just look at something in a box. . . . [T]he police chief, . . . looked at this in terms of making his final call." Id., 51(25)-52(1, 3-5, 9-11).

## A

In considering whether the exclusion of additional social media posts contained in City Exhibit 1 was proper, the court begins with a review of the five Facebook posts that were made part of the evidentiary record. See Joint Exhibit 12. To begin, two of the five Facebook posts by Judkins contain overtly racist and inflammatory language consisting of what is euphemistically referred to as the "N" word. As observed by our Appellate Court, "[t]he descriptor 'N' word signifies a racially offensive and inflammatory term." *State v. Labarge*, 164 Conn. App. 296, 312 n.8, 134 A.3d 259 (2016); see also *State v. AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 469 n.3 (referring to a telephone message that included use of the "N" word as "a profane and racist message").

More recently, our Supreme Court observed, “[n]ot only is the word ‘nigger’ undoubtedly the most hateful and inflammatory racial slur in the contemporary American lexicon . . . but it is probably the single most offensive word in the English language. . . . \*\*\* In fact, because of the racial prejudice and oppression with which it is forever linked, the word ‘nigger,’ when used by a white person as an assertion of the racial inferiority of an African-American person, is more than a mere offensive utterance. . . . No word . . . is as odious or loaded with as terrible a history.” (Citations omitted; internal quotation marks omitted; brackets omitted.) *State v. Liebenguth*, \_\_\_ Conn. \_\_\_, \_\_\_ A.3d \_\_\_ (2020 WL 5094669, \*8) (2020). Thus, both prior and subsequent to the issuance of the award, our appellate courts characterized use of the “N” word as “inflammatory”. “Inflammatory” is defined as an act “tending to excite anger, disorder or tumult”. Merriam-Webster’s Collegiate Dictionary (11th ed. 2012); see also Black’s Law Dictionary (11th ed. 2019) (defining “Inflammatory” as “[t]ending to cause strong feelings of anger, indignation or other type of upset; tending to stir the passions”). “[T]he word has rightly been characterized as the most provocative, emotionally-charged and explosive term in the [English] language.” *State v. Liebenguth*, supra (2020 WL 5094669, \*8) (Citation omitted; internal quotation marks omitted; brackets omitted.) *Id.*<sup>4</sup>

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<sup>4</sup> The board concluded that the word “nigga”—as disseminated in Judkins’ social media posts—is “commonly used in a non-offensive, even friendly manner, by many people, and is also commonly used in music and popular entertainment. This word is obviously a close derivative of the universally offensive word that ends with an ‘-er’ instead of an ‘-a’.” (Emphasis added.) Award, p. 18. This conclusion was apparently based on Judkins’ testimony that he “use[d] the term ‘nigga’ not in a racist manner, or to denigrate African Americans, but to criticize gang and criminal culture. Also, [Judkins] is a young man, a sergeant in the military reserve, and he testified that in his squadron of mixed race reservists they regularly use the term ‘nigga’ to friends and colleagues.” Award, p. 10. The attempt by the board, and Judkins, to make a meaningful distinction between the two words is unconvincing, to say the least, and the court is unable to discern a substantive difference between these words in the context of this case, in light of the holdings in *Liebenguth*,

In addition to reposting material, on more than one occasion, using a word that our Supreme Court has described as “inflammatory” as well as “provocative, emotionally-charged and explosive,” Judkins referred to a former African-American president of the United States as an “anti American muslim piece of shit president[.]” (Post dated October 13, 2013.) According to the board itself, the foregoing was “the most problematic post” made by Judkins, noting that “much of [it] is littered with classic ‘hate speech’”; Award, pp. 17-18 (emphasis added).

In connection with another post of Judkins (post dated December 13, 2013), the board concluded that “the obvious problem with this post is that it easily could be interpreted as offensive to Muslims, and offensive to gay persons.” Id., p. 17.

The foregoing demonstrates that Judkins used social media to disseminate hate speech, on multiple occasions, including the use of an “explosive” racial slur that tends to inflame, cause strong feelings of anger, stir passions, and excite disorder and tumult. The question presented is whether, in determining if the plaintiff’s termination of Judkins based on the foregoing posts violated the Agreement, the board properly excluded other social media posts of Judkins condoning, advocating, or glorifying violence against certain individuals, and expressing disdain for judicial authority. For the reasons that follow, the board was not required to consider the five

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[Continuation of footnote 4]

*AFSCME*, and *Labarge*, supra. Given that the word used in Judkins’ social media posts is unquestionably a “close derivative” of the word “nigger”—if not a variant that is substantively identical in meaning—Judkins’ attempts to justify his use of the word cannot withstand the holding of our Supreme Court that it is the most hateful and inflammatory racial slur in the contemporary American lexicon, thereby—by definition—tending to excite anger, disorder and tumult. The board’s statement “that the offensiveness of the posts is to a large extent *subjective*”; Award, p. 16 (emphasis added); is also rejected.

Facebook posts in an evidentiary vacuum, and the court concludes that the exclusion of City Exhibit 1 was improper.

B

Parties are entitled to a full and fair hearing before an arbitration panel. “[A] party challenging an arbitration award on the ground that the arbitrator refused to receive material evidence must prove that, by virtue of an evidentiary ruling, [the party] was in fact *deprived of a full and fair hearing* before the arbitration panel.” (Citations omitted; emphasis added.) *O & G/O’Connell Joint Venture v. Chase Family Limited Partnership No. 3*, supra, 203 Conn. 149. “[A]n arbitration hearing is fair if the arbitrator gives each of the parties to the dispute an adequate opportunity to present its evidence and argument.” (Citations omitted; internal quotation marks omitted.) *Bridgeport v. Kasper Group, Inc.*, supra, 278 Conn. 475-76. A full and fair hearing before an arbitration panel—which includes an adequate opportunity to present evidence and argument—is necessary because “[t]he presumptive validity of consensual arbitration awards depends on the underlying integrity of the arbitration process. When that integrity is tainted either by actual impropriety or the appearance of impropriety, the arbitration award cannot be permitted to stand.” (Citation omitted.) *O & G/O’Connell Joint Venture v. Chase Family Limited Partnership No. 3*, supra, 203 Conn. 148.

In deciding whether or not the board deprived the plaintiff of a full and fair opportunity to present material evidence by excluding City Exhibit 1, the court emphasizes that arbitral misconduct “does not lend itself to precise definition” and is “best illustrated by example.” *Id.*, 203 Conn. 146. Of necessity, the inquiry is case-by-case driven and guided by the particular circumstances of each matter.

Here, the reinstated employee is a police officer employed by a municipality. As a result, the nature of his employment “implicates public safety or the public trust.” (Citations omitted.) *Burr Road Operating Co. II LLC v. New England Health Care Employees Union*, supra, 316 Conn. 635. “Nationally, in the vast majority of cases in which courts have vacated for public policy reasons arbitration awards reinstating terminated employees, the grievant has been a public sector employee, primarily working in fields such as *law enforcement*, education, transportation, and health care, in other words, fields that *cater to vulnerable populations* or *help ensure public safety*. . . . This reflects the fact that the threat to public policy involved in reinstating a terminated employee is magnified when the offending employee provides an essential public service, and especially when he is employed by, represents, and, ultimately, is answerable to the people. \*\*\* In Connecticut, in every case wherein [the Supreme Court] has concluded that an arbitration award reinstating a terminated employee offended public policy, the grievant was a state or municipal employee.” *Id.*, 635-37. (Citations omitted; emphasis added.) See also Ann C. Hodges, “Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law,” 16 Ohio St. J. on Disp. Resol. 91, 123 (2000) (“it is apparent that judicial invocation of public safety is strongly associated with decisions to vacate arbitration awards.”)

Given that the plaintiff asserted several public policy arguments before the board—including that Connecticut public policy prohibits officer misconduct involving racial bias and that frustrates the ability to effectively police a diverse population while charged with the public trust—and further given the fact that the evidence admitted contained hate speech, City Exhibit 1 was highly relevant and material to the arbitration panel’s conclusion that the plaintiff violated the Agreement by terminating Judkins. This is true even if the decision to terminate was based solely on the five Facebook posts contained in Joint Exhibit 12.

Relevant evidence “means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence.” Conn. Code of Evid. § 4-1. Moreover, “[e]vidence is not necessarily cumulative if it overlaps with evidence previously received and it obviously is not cumulative if it presents new information.” (Citations omitted.) *Bridgeport v. Kasper Group, Inc.*, supra, 278 Conn. 482. The excluded social media posts contained in City Exhibit 1 were relevant and material, in that they placed into context and materially affected the weight and significance of the five Facebook posts considered by the board in reaching its conclusions—most importantly, in deciding to reinstate Judkins rather than endorsing his termination. The racial, religious, and other discriminatory animus reflected in the Facebook posts admitted into evidence takes on a different—and considerably more sinister—character when coupled with the endorsement, advocacy, or glorification of violence, and disdain for judicial authority, reflected in the excluded posts. Bias can be toxic when combined with violence, particularly in a law enforcement officer charged with ensuring public safety. Thus, City Exhibit 1 was pertinent and material to the board’s consideration and its assessment of the five Facebook posts.

In addition, while excluding City Exhibit 1, the board freely considered mitigating factors in reaching its conclusion to reinstate Judkins, including his nearly ten-year employment with the police department, his “good record”, and status as a military reservist. Thus, the board selectively admitted relevant and material evidence that supported its conclusion to sustain the grievance, while excluding relevant and material evidence that favored the plaintiff’s decision to terminate Judkins. In sum, the preclusion of City Exhibit 1 constituted a refusal to hear evidence both pertinent and material to the controversy, and prejudiced the plaintiff’s rights by requiring it to defend the grievance with one hand tied behind its proverbial back.

To establish the substantial prejudice needed to vacate an award, it suffices if the excluded evidence was *likely* to affect the result. *Bridgeport v. Kasper Group, Inc.*, supra, 278 Conn. 476-77 (“a new trial will be ordered only when the improper evidentiary ruling [*likely*] . . . affect[ed] the result.” [citation omitted; internal quotation marks omitted; emphasis added.]); *Krassner v. Ansonia*, 100 Conn. App. 203, 209, 917 A.2d 70 (2007) (same); see also *Hartford Municipal Employees Assn. v. Hartford*, 128 Conn. App. 646, 665-66, 19 A.3d 193 (2011) (Flynn, J., dissenting) (“Each side to an arbitration must be given a full and fair opportunity to present material evidence that is not cumulative. . . . If the panel refuses evidence that it material, the challenging party must still show substantial prejudice, meaning that it was likely to affect the result. . . . The burden is not to show that the evidence, if admitted, would have *dictated* the result with certainty.” [citations omitted; emphasis in original.]).

The content of City Exhibit 1 was likely to have affected the arbitration panel’s award in this case. As the “N” word reposts by Judkins, and his post declaring, “[f]uck this anti American muslim piece of shit president!”, constituted hate speech and contained inflammatory and “explosive” language—and as he also used language that the board considered potentially offensive to a religious minority as well as the gay community—Judkins’ *other* posts endorsing, advocating, and glorifying violence, and deriding judicial authority, were likely to have affected the result. An arbitration award should be vacated where the arbitrator refuses to consider evidence that is material and not cumulative, which refusal substantially prejudices the appealing party. *Bridgeport v. The Kasper Group, Inc.*, supra, 278 Conn. 483 (“the plaintiff was substantially prejudiced by the arbitrator’s refusal to consider the testimony because it was highly probative and very likely would have altered the outcome of the arbitration had it been introduced.” [citation omitted.]).

### III

As the court concludes that the arbitration award should be vacated based on General Statutes § 52-418 (a) (3), the court need not address the plaintiff's additional and alternative arguments that the arbitrators exceeded their powers or imperfectly executed them, and that the award violates public policy.<sup>5</sup>

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<sup>5</sup> “A vacatur on public policy grounds is premised on the notion that the parties cannot expect an award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them.” (Citation omitted; internal quotation marks omitted.) *South Windsor v. South Windsor Police Union*, 41 Conn. App. 649, 654, 677 A.2d 464 (1996). “Police practices and procedures may reflect public policy but those practices and procedures *do not determine that policy*.” (Emphasis added.) *Id.*, 41 Conn. App. 658. Compare with *In re New York State Law Enforcement Officers Union*, 255 App. Div. 2d 54, 60, 694 N.Y.S.2d 170 (1999) (appellate division affirming trial court order vacating arbitration award reinstating corrections officer employee who flew Nazi flag on the porch of his home, and holding, in part, that “[i]n our view, the underlying award must be deemed violative of a strong public policy reflected in readily identifiable sources, to wit, *the employee manual*, which proscribes the presence within our prison system of those who affiliate with racist groups, . . .” [citations omitted; emphasis added.]).

In Connecticut, the courts look to a variety of other sources “in determining whether an arbitral award violates a well-defined public policy, and have cited, as example of possible sources, statutes, administrative decisions and case law. . . . In those cases in which we have vacated an arbitral award based on public policy grounds, the public policy has most commonly been grounded in the General Statutes.” (Citation omitted.) *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 273 Conn. 634, 657-58, 872 A.2d 423 (2005); see also *Town of South Windsor v. South Windsor Police Union*, supra, 41 Conn. App. 654 (“Our statutes and case law are sources of public policy . . .”) “When a municipal employee violates the public policies enumerated in state statutes and employment regulations, a reviewing court cannot enforce an arbitral award reinstating him to employment as a police officer.” (Citations omitted.) *Board of Police Commissioners v. Stanley*, 92 Conn. App. 723, 741, 887 A.2d 394 (2005).

In 2015, our Supreme Court “clarif[ied] the factors a reviewing court should consider when evaluating a claim that an arbitration award reinstating a terminated employee violates public policy, and, by extension, *the types of factual findings an arbitrator may make in order to assist a reviewing court in considering such a challenge*. Specifically, in determining whether termination of employment was necessary to vindicate the public policies at issue, [this court] . . . focus[es] on four principal factors: (1) any guidance offered by relevant statutes, regulations, and other embodiments of public policy at issue; (2) whether the employment at issue implicates public safety or the public trust; (3) the relative egregiousness of the grievant’s conduct; and (4) whether

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[Continuation of footnote 5]

the grievant is incorrigible.” (Footnote omitted; citation omitted; emphasis added.) *Burr Road Operating Co. II LLC v. New England Health Care Employees Union*, supra, 316 Conn. 633-34.

As this court does not reach the public policy arguments made by the plaintiff because a rehearing by the board is required, the question of whether a reinstatement of Judkins, after a period of suspension, would violate the clear public policy of our state, as it exists today, remains an open question. See General Statutes § 7-294d, as amended by Public Act 20-1, § 3 (effective July 31, 2020) (establishing authority of the Police Officer Standards and Training Council, including power to revoke a municipal police officer’s certification if “the holder has been found by a law enforcement unit, pursuant to procedures established by such unit and considering guidance developed under subsection [g] of this section, to have engaged in *conduct that undermines public confidence in law enforcement*, including, but not limited to discriminatory conduct, . . .” [emphasis added.]); see also General Statutes § 54-11, known as the “Alvin W. Penn Racial Profiling Prohibition Act” (which reads in part, at subsection [c], that “[n]o member of . . . a municipal police department or any other law enforcement agency shall engage in racial profiling.”); General Statutes § 52-571c, entitled, “Action for damages resulting from intimidation based on bigotry or bias” (“[a] Any person injured in person or property as a result of an act that constitutes a violation of section 53a-181j, 53a-181k or 53a-181l may bring a civil action against the person who committed such act to recover damages for such injury.”); General Statutes § 53a-181k (“A person is guilty of intimidation based on bigotry or bias in the second degree when such person maliciously, and with specific intent to intimidate or harass another person or group of persons because of actual or perceived race, religion, ethnicity, disability, sex, sexual orientation or gender identity or expression of such other person or group of persons, does any of the following: [1] Causes physical contact with such other person or group of persons, . . . or [3] *threatens, by word or act, to do an act described in subdivision [1]* . . . of this subsection, if there is reasonable cause to believe that an act described in subdivision [1] . . . of this subsection will occur.” [emphasis added.]); *State v. AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 477 (“We agree with the trial court that an explicit, well-defined and dominant public policy is identified here, wherein a state employee, while on duty, utilized a state owned telephone to place an anonymous, obscene and racist call.”)

To date, and while raised by the plaintiff in support of its application, Connecticut courts have not addressed the question of whether conduct that undermines public confidence in law enforcement based on racial bias, or other discriminatory conduct, violates a clear public policy sufficient to vacate an arbitral award. One jurisdiction has noted the “well-defined and public policy that condemns the *perception* of racism in policing.” (Emphasis added.) *Massachusetts Bay Transp. Authority v. MBTA Superior Officers Assoc.*, Superior Court of Massachusetts, Suffolk County, No. 053429 (Nov. 22, 2005 *Connolly, J.*) (20 Mass. L. Rptr. 213) (noting that this public policy is based, in part, the fact that “racial profiling violates art. 14 of the Massachusetts constitution.” [citation omitted.].)

Recently, in the case of *City of Hartford v. Hartford Police Union*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-19-6112729 S (August 6, 2020 *Budzik, J.*), the court vacated

## CONCLUSION

For the foregoing reasons, the amended application to vacate arbitration award (No. 103.00) is GRANTED. The State Board of Mediation and Arbitration is hereby DIRECTED to conduct a rehearing of this matter in accordance with General Statutes § 52-418 (b).

A handwritten signature in black ink, appearing to read 'J. Pierson', written over a horizontal line.

PIERSON, J.

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*[Continuation of footnote 5]*

an arbitration award reinstating a police officer who was fired for “engaging in a racial epithet filled tirade when he was arrested for driving while intoxicated and interfering with police.” The court vacated the reinstatement based on the conclusion that it “violates the public policy requiring obedience to court orders” and “implicates [the plaintiff’s] obligation to comply with the provisions of a 1973 federal consent decree prohibiting the use of racial epithets by Hartford police officers.” (Citation omitted.) This case does not involve the alleged violation of a court order nor does the plaintiff argue that the award violates public policy on that basis. Rather, the plaintiff’s public policy argument is based, inter alia, on the claim that there is a clear public policy in Connecticut against police officer misconduct that “1) involves racial bias (e.g., ‘hate speech’) and/or 2) . . . and the need to effectively police a diverse population, with the trust of the public . . .” Pl. Memo. in Supp. of App. to Vacate (No. 104.00), p. 25.